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Remarks

In view of the following discussion, the Applicant submits that none of the claims now pending in the application are non-enabling, anticipated, or obvious under the respective provisions of 35 U.S.C. § 112, §102, and §103. Thus, the Applicant believes that all of these claims are now in allowable form. Applicant also believes that any alleged deficiencies in the specification and/or drawings have been satisfactorily corrected in this Response.

It is to be understood that the Applicant, does not acquiesce to the Examiner's characterizations of the art of record or to Applicant's subject matter recited in the pending claims. Further, Applicant is not acquiescing to the Examiner's statements as to the applicability of the prior art of record to the pending claims by filing this Response.

Objections

A. IN THE DRAWINGS:

The Examiner has objected to the drawings as failing to comply with 37 C.F.R. §1.84(p)(5) because they include the reference sign 311 in Fig. 3 without being mentioned in the written specification.

In response, Applicant has hereinabove provided a replacement paragraph at page 7, lines 2-6 of the originally filed specification. Specifically, the replacement paragraph describes the method steps of the subject invention at a point where it is appropriate to introduce step 311. Accordingly, clarification of where the process continues after step 309 is provided by identifying the process as continuing to step 311 after step 309. No new matter has been entered by virtue of this amendment as support is clearly found in Fig. 3. Accordingly, withdrawal of the objection is respectfully requested.

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B. IN THE SPECIFICATION:

The Examiner has indicated that the Abstract is objected to because of the length of the abstract.

In response, Applicant has amended the Abstract so that it is in conformity with 37 C.F.R. §1.72. Accordingly, withdrawal of the objection is respectfully requested.

The Examiner has also objected to the written specification because of the alleged inconsistency in the language at page 4, line 13.

In response, Applicant has hereinabove amended the paragraph in accordance with the Examiner's recommendation (i.e., Intranet 140 has been changed to Intranet 141). Accordingly, Applicant respectfully requests that the objection be withdrawn.

Rejections

Rejection of Claims under 35 U.S.C. § 112

The Examiner has rejected claims 1-4 and 8 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly, point out and distinctly claim the subject matter which Applicant regards as the invention. Specifically, in each of the above-identified claims, there is an alleged insufficient antecedent basis for different phrases in the claims.

In response, Applicant has hereinabove amended each of the above identified claims to correct any alleged deficiencies with regard to antecedent basis. The above-identified amendments are self exploratory in nature; thus, no additional commentary is necessary. If the Examiner still finds any antecedent basis problems with any of the amendment claims, Applicant requests Examiner to contact Applicant's below signed agent to discuss same informally before preparation of an additional Official Action.

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Rejections of claims under 35 U.S.C. § 102

Claims 1, 2 and 5-9 are rejected under 35 U.S. C. §102(e) as being anticipated by U.S. Patent Number 6,609,205 issued August 19, 2003 to Bernhard et al. (hereinafter "Bernhard"). Specifically, the Examiner alleges that Bernhard discloses a method for thwarting coordinated SYN denial of service attacks against a server in a network comprising the steps of controlling a network switch to divert a predetermined fraction of SYN packets destined for a server, to a web guard processor, establishing a first TCP connection between one or more clients originating the packets and the web guard processor and a second TCP connection between the clients and server. The Examiner offers Fig. 1 and Col. 4, lines 12-27 for disclosing an intrusion detection system (sensor 11) capable of examining packets of TCP protocols. The Examiner further offers that Bernhard allegedly teaches monitoring the number of timed-out connections between the web guard server and the clients as per Col. 7, lines 28-37. The Examiner also offers controlling of a switch to divert all SYN packet destined to a server to the web guard processor. Specifically, once a SYN event occurs, the process determines whether ACK occurs. If the number of SYN packets exceeds 50, all SYN packets are released and misuse is detected per Fig. 2, Col. 3, lines 41-52; Col. 6, lines 46-51 and Col. 9, lines 5-18. The Examiner also uses the above-identified portions of Bernhard to allege anticipation of elements of claims 2, 5, 6, 7, 8, and 9. In response the rejection is respectfully traversed.

Applicant offers that while Bernhard is in the technical field of the subject invention, there are deficiencies in the exact teachings of Bernhard. "Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim" (Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 730 F.2d 1452, 221 USPQ 481, 485 (Fed. Cir. 1984) (citing Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983)) (emphasis added). Bernhard fails to

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disclose each and every element of the claimed invention, as arranged in the claim.

The Examiner has expanded upon the claim language to force the teachings of the prior art to fit the claimed element, and thereby support the conclusion of anticipation. Such action is not permissible. The prior art must be such that a person of ordinary skill in the field of the invention would consider there to be no difference between the claimed invention and the reference disclosure. Scripps Clinic & Research Foundation v. Genentech, Inc., 927 F.2d 1565, 18 USPQ 2d 1001, 1010 (Fed. Cir. 1991). In other words, the prior art reference must put the claimed invention in the hand of one skilled in the art. In re Donohue, 766 F.2d 531, 533, 226 USPQ 619, 621 (Fed. Cir. 1985).

Specifically, a first point is that Bernhard does not teach, disclose or suggest a "predetermined fraction of SYN packets" being diverted or otherwise processed in accordance with the subject invention. The Examiner cites Col. 4, lines 12-27 to support his position on this specific element of the claimed invention; however, that portion of Bernhard does not speak of examining a predetermined fraction of SYN packets. Rather, it only provides for a general examining of packets in the overall system. Each packet coming into the sensor (11) is examined (per Col. 4, lines 38-40), but the reference falls short in additional specific teachings as to how many packets are sent along this path. It is clearly not known by examining Bernhard how many packets are in fact tested or how the selection of tested packets is determined.

The Examiner then offers three specific portions of Bernhard to allege a teaching of what happens to packets once the alarm event has occurred. Specifically, the Examiner offers Col. 3, lines 41-52, Col. 6, lines 46-52 and Col. 9, lines 5-18. However, in each of the three above cited portions of Bernhard, there is no specific teaching regarding diverting of all packets destined to a server to a web guard processor. For example, Col. 3, lines 41-52 presents only terminating a connection if intrusion is detected. That is, there is no specific teaching or disclosure of diverting packets by virtue of this terminated

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connection. Further, and with respect to claim 7, there is also no specific discussion of forwarding packets to a TCP proxy in the manner claimed.

Further to these points, Col. 6, lines 46-51 presents the specifics of what occurs in Bernhard when the count runs above 50 with a certain time period (an alarm is indicated), but the cited portion does not teach, disclose or suggest anything with regards to diverting of packets (with respect to claims 1 and 8) or establishing TCP proxies (with respect to claim 7) once the alarm condition is realized. Finally, and with respect to Col. 9, lines 5-18, this cited portion generally discusses another embodiment of Bernhard, but does not go into specifics of diverting packets as indicated above (with respect to claims 1 and 8) or establishing TCP proxies (with respect to claim 7).

As such, the Applicants submit that claims 1, 7 and 8 are not anticipated and fully satisfy the requirements under 35 U.S.C. § 102 and are patentable thereunder. Furthermore, claims 2-6 and 9 depend, either directly or indirectly, from independent claims 1 and 8 and recite additional features thereof. As such, and for at least the same reasons discussed above, the Applicants submit that these dependent claims also fully satisfy the requirements under 35 U.S.C. § 102 and are patentable thereunder. Therefore, the Applicants respectfully request that the rejection be withdrawn.

Rejection of Claims under 35 U.S.C. § 103

Claims 3 and 4 are rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over Bernhard in view of U.S. Published Application No. U.S. 2003/0110394 to Sharp et al. (hereinafter Sharp), published June 12, 2003. Specifically, the Examiner indicates that Bernhard allegedly discloses the claimed invention as described above with respect to the specifics indicated in the 102 rejection section; however, Bernhard did not explicitly teach if the number of timed-out connections between the web guard and the clients exceed a second predetermined threshold to delete all SYN packets destined for the server.

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However, Sharp allegedly discloses a method used to detect and prevent spoofing where when it comes to flooding, there are four threshold levels that exist. As such, it would have been obvious to one of ordinary skill in the art the time the invention was made to combine the teachings of Sharp and the system of Bernhard because as higher thresholds are violated, the system automatically begins the process of chocking and holding certain packets while sending alarms and notifications to different areas in the system. The rejection is respectfully traversed.

The test under 35 U.S.C. § 103 is not whether an improvement or a use set forth in a patent would have been obvious or non-obvious; rather the test is whether the claimed invention, considered as a whole, would have been obvious. Jones v. Hardy, 110 USPQ 1021, 1024 (Fed. Cir. 1984) (emphasis added). Thus, it is impermissible to focus either on the "gist" or "core" of the invention, Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc., 230 USPQ 416, 420 (Fed. Cir. 1986) (emphasis added). Moreover, the invention as a whole is not restricted to the specific subject matter claimed, but also embraces its properties and the problem it solves. In re Wright, 6 USPQ 2d 1959, 1961 (Fed. Cir. 1988) (emphasis added).

It has been above argued and presented that Bernhard does not form the basis for an adequate rejection under the anticipation statute. That is, Bernhard is missing important elements regarding the predetermined diversion of a number of packets as well as subsequently diverting all packets. Therefore, Bernhard in combination with any other secondary cited art which allegedly introduces additional features of the subject invention but still does not address the missing elements in Bernhard does not result in the claimed invention. Specifically, claims 3 and 4 depend either directly or indirectly from claim 1 which has been discussed above. The addition of how Sharp allegedly handles alarm conditions does not make the subject invention obvious in view of a method that does not handle SYN packet movement in the manner claimed.

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Additionally, it is respectfully submitted that Sharp may in fact not be applicable prior art. It is respectfully indicated that Applicants filing date of the subject application is September 28, 2000. The filing date of Sharp is indicated as February 20, 2002. As such, Sharp was filed subsequent to the filing date of Applicant's invention. It is also noted that Sharp is a continuation-in-part of an application filed on June 6, 2001 (which is also subsequent to the filing date of Applicant's subject application). Also noted is that the June 6, 2001 application is a continuation-in-part of an application filed on May 17, 2000. Therefore, if the material that the Examiner is relying on to establish the teachings or suggestions of Sharp are contained only in the February 20, 2002 or June 6, 2001 filings, then Sharp is not applicable prior art under the rejection. As such, it is respectfully submitted that the rejection under 35 U.S.C. § 103 may be improper. At the very least, said rejection is imperfect in that the effective filing date of the material relied upon by the Examiner is at this time undetermined and the *prima facie* case of obviousness at question. "Unless the filing date of the earlier non-provisional application is actually needed, for example in the case of an interference or to overcome a reference, there is no need for the office to make a determination as to whether the requirement of 35 U.S.C. § 120, that the earlier non-provisional application discloses the invention of the second application in the manner provided by the first paragraph of 35 U.S.C. § 112, is met and whether a substantial portion of all of the earlier non-provisional application is repeated in the second application in a continuation-in-part situation." MPEP § 201.08. Since the filing date of the earlier non-provisional is needed, the Office must make the appropriate determination as to the disclosure of material therein. It is respectfully submitted that the appropriate reference should be cited and subsequently provided to the Applicant (per MPEP 707.05(a)) to perfect or appropriately substantiate the 103 rejection.

As such, Applicants submit that claims 3 and 4 are not obvious and fully satisfy the requirements under 35 U.S.C. § 103 and are patentable thereunder. Therefore, the Applicants respectfully request that the rejection be withdrawn.

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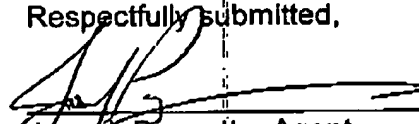
CONCLUSION

Thus, the Applicants submit that claims 1-9 are in condition for allowance. Furthermore, the specification and Abstract has been amended as requested by the Examiner. Accordingly, both reconsideration of this application and its swift passage to issue are earnestly solicited.

Applicants undersigned Agent thanks Examiner Khosravan and Supervisory Patent Examiner Dharia for their preliminary teleconferences regarding the subject application. It is respectfully requested that upon review of this Response, and before preparation of a second Office Action, the Applicant be granted a telephone interview in accordance with the interview request faxed to Examiner Khosravan on March 10, 2004. Applicant is aware of the time constraints place on the Examiner and thanks the Examiner in advance for providing the Applicant with the opportunity to discuss the merits of the case to facilitate disposition of the application.

March 16, 2004

Respectfully submitted,



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CERTIFICATE OF FACSIMILE TRANSMISSION under 37 C.F.R. §§ 1.6 and 1.8

I certify that this correspondence is being transmitted by facsimile under 37 C.F.R. §§ 1.6 and 1.8 on MARCH 16 2004 and is addressed to the Commissioner for Patents, Washington, D.C. 20231, Facsimile Number: 703-872-9306

CAROL WILSON
Type or print name of person signing certification
Carol Wilson
Signature